IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

PHILIP RAY WORKMAN, Plaintiff, v. PAUL SUMMERS, JOHN CAMPBELL, RAY MAPLES, CHARLES TRAUGHBER, BILL DALTON, DON DILLS, TOWNSEND ANDERSON, SHEILA SWEARINGEN, LARRY HASSELL and RICKY BELL, in their official capacity, and JOHN DOES 1- 100, Defendants.	)	No. 3:01-cv-290

RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiff, Philip Ray Workman ("Workman"), moves this Court for the issuance of a temporary restraining order and preliminary injunction to stay his execution scheduled for March 30, 2001. As grounds for the motion, he relies on the above-styled complaint, filed under 42 U.S.C. §§ 1983, 1985, in which he accuses several state officials of depriving him of his constitutional rights in connection with his request for commutation of his death sentence by the Governor of Tennessee. But even accepting all of Workman's various allegations as true — and defendants

unequivocally deny them — Workman has no likelihood of success on the merits of his complaint because it fails to state any cognizable claim for relief. Accordingly, and in light of the paramount importance of the State's interest in protecting the finality of its judgments, Workman's motion for a temporary restraining order and preliminary injunction should be denied.

STATEMENT OF THE CASE

Workman was convicted by a jury in 1982, after trial, of the first degree felony murder of Memphis Police Lieutenant Ronald Oliver. At a separate sentencing hearing, the same jury sentenced Workman to death pursuant to Tenn. Code Ann. § 39-2-203(g)(1982), finding five statutory aggravating circumstances.[1]

Following the conclusion of two state post-conviction proceedings in 1986 and

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[1] 1) the defendant knowingly created a great risk of death to two or more persons, other than the victim murdered; 2) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant; 3) the murder was committed while the defendant was engaged in committing or was fleeing after committing or attempting to commit, the offense of robbery; 4) the murder was committed by the defendant while he was in or during the escape from lawful custody or place of lawful confinement; and 5) the murder was committed against any law enforcement officer engaged in the performance of his duties, and the defendant knew, or reasonably should have known, that such person was a law enforcement officer engaged in the performance of his duties, and the defendant knew, or reasonably should have known, that such person was a law enforcement officer. Tenn. Code Ann. § 39-2-203(i)(3), (6), (7), (8), (9) (1982). The Sixth Circuit subsequently determined that the jury improperly considered the felony murder aggravator, but that this error was harmless. *Workman v. Bell*, 178 F.3d 759, 774 (6th Cir 1998).

1992, respectively, Workman filed a petition for the writ of habeas corpus in federal district court.[2] The district court denied relief, awarding summary judgment to respondent on all claims and denying Workman's motion for summary judgment. Judgment was entered on November 14, 1996. That judgment was affirmed on appeal. *Workman v. Bell*, 178 F.3d 759 (6th Cir. 1998), *cert. denied*, 120 S.Ct. 264 (1999), *rehearing denied*, 120 S.Ct. 573 (1999). On January 3, 2000, the Tennessee Supreme Court set Workman's execution for April 6, 2000.

On January 27, 2000, Workman filed an Application for Commutation to the Governor of the State of Tennessee. A hearing was scheduled on that application by the Tennessee Board of Probation and Parole ("Parole Board"or "Board") for March 9, 2000. On March 5, 2000, Workman filed a Motion to Reopen his habeas corpus case with the Sixth Circuit Court of Appeals. On March 8, 2000, Workman withdrew his Application for Commutation. On March 24, 2000, Workman also filed a Motion for Leave to File a Second Habeas Corpus Petition and a Motion for Stay of Execution with the Sixth Circuit. On March 31, 2000, a three-judge panel of the Court denied all of Workman's pending motions. On April 3, 2000, Workman filed petitions to rehear and suggestions for rehearing en banc. On the same date, a clemency hearing was held before a representative of the Governor. On April 4,

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[2] This was actually Workman's second-in-time petition. His first petition was filed November 18, 1987, and dismissed without prejudice on August 27, 1992.

2000, a majority of the members of the Sixth Circuit granted Workman's petition to rehear en banc and stayed his execution "until further order of the Court."

On September 5, 2000, an equally divided en banc Court of Appeals rejected petitioner's motion to reopen and dissolved the previously-entered stay of execution. *Workman v. Bell*, 227 F.3d 331 (6th Cir. 2000). On October 5, 2000, the Tennessee Supreme Court set January 31, 2001, as petitioner's new execution date. Workman subsequently filed another application for commutation and, on January 25, 2001, a hearing was conducted by the Parole Board. At the conclusion of that hearing, the Board voted unanimously to recommend that the Governor deny clemency.

On January 26, 2001, the en banc Court of Appeals granted Workman a stay of execution pending a decision by the United States Supreme Court on his petitions for writ of certiorari and for an original writ of habeas corpus. On February 26, 2001, the Supreme Court denied both petitions, and on February 28, 2001, the Tennessee Supreme Court reset Workman's execution date for March 30, 2001.

On March 7, 2001, Workman filed a motion in the Sixth Circuit to declare the previously-entered stay of execution still in effect and the order resetting his execution date void. On March 19, 2000, Workman filed another motion to reopen his habeas corpus case and to stay his execution.[3] On March 21, 2001, the Sixth

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[3] In support of that motion, Workman raised essentially the same allegations that he includes in his instant complaint. Workman clearly need not have delayed the filing of this complaint until some sixty hours prior to his scheduled execution.

Circuit en banc Court of Appeals denied the motion to declare the previously-entered stay of execution still in effect. On March 23, 2001, a three-judge panel of the Sixth Circuit denied the motions to reopen and to stay the execution. On March 26, 2001, Workman filed a petition for rehearing by the full en banc Court of that denial. That petition remains pending.

On March 27, 2001, the Governor of Tennessee determined that executive clemency in Workman's case was not appropriate and denied his clemency application. The Governor based his determination on the following criteria: 1) he was convinced that Workman was guilty of first degree felony murder; 2) the case involved the murder of a law enforcement officer; 3) the punishment was appropriate under law; and 4) he was confident that Workman had had adequate access to the courts. App. at 1.

ARGUMENT

I. WORKMAN HAD NO PROTECTIBLE DUE PROCESS RIGHTS IN THE CLEMENCY PROCEEDINGS CONDUCTED BY THE PAROLE BOARD; HIS CLAIMS OF DEPRIVATION OF RIGHTS UNDER THE DUE PROCESS CLAUSE MUST FAIL.

Workman's § 1983 complaint is wholly comprised of an attack upon the constitutionality of clemency proceedings conducted by the Parole Board upon his application for commutation. As a preliminary matter, defendants assert that

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See West v. Bell, 242 F.3d 338, __, 2001 WL 194336, *4 (6th Cir. 2001)(published page numbers unavailable).

Workman has waived his right to mount any such challenge. On March 9, 2000, the Parole Board was poised to conduct a hearing on Workman's first application for commutation. One day before that hearing, on March 8, 2000, Workman voluntarily withdrew his application. At that point, the Governor of Tennessee would have been well within his rights to have denied Workman any further access to the clemency process. Although he did not, and afforded Workman a second opportunity to apply for commutation, Workman should not now be heard to raise complaints about that clemency process.

But assuming Workman has not waived his right to attack the clemency process, each and every count of the instant complaint is without merit and fails to state a claim for relief under 42 U.S.C. §§ 1983 or 1985. "[P]ardon and commutation decisions have not traditionally been the business of the courts; as such, they are rarely, if ever, appropriate subjects for judicial review." *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464, 101 S.Ct. 2460, 2464, 69 L.Ed.2d 158 (1981). The United States Supreme Court has never held otherwise; in fact, it reaffirmed this holding in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288, 118 S.Ct. 1244, 1253, 140 L.Ed.2d 387 (1998). There, in an opinion delivered with the judgment of the Court, four justices observed that clemency is a matter of grace committed to the discretion of the executive authority. Such proceedings, they continued, "are not an 'integral part of the . . . system for finally adjudicating the

guilt or innocence of a defendant." *Id.* at 285, *quoting Evitts v. Lucey*, 469 U.S. 387, 393, 105 S.Ct. 830, 834, 83 L.Ed.2d 821 (1985). Accordingly, the justices concluded that the Due Process clause does not afford a clemency petitioner *any* due process procedural protection. *Id.*

Workman, however, seizes on the concurring opinion of Justice O'Connor in *Woodard*, in which she was joined by three other justices.[4] These four justices opined that "some *minimal* procedural safeguards apply to clemency proceedings." *Id.* at 289 (O'Connor, J., concurring). As examples of what might warrant judicial intervention in state clemency proceedings, however, Justice O'Connor cites a clemency scheme whereby the decision is made by the flip of a coin, or where the petitioner is arbitrarily denied access to the clemency process. *Id.* While these examples are not rules, they "illustrate the severe limits that courts must put upon themselves" when addressing legal challenges to clemency. *Wilson v. U.S. Dist. Ct. N. Dist. California*, 161 F.3d 1185, 1188 (9th Cir. 1998)(Fernandez, J., dissenting). *See also Ohio Adult Parole Authority v. Woodard*, 107 F.3d 1178, 1187 (6th Cir. 1997), *reversed*, 523 U.S. 272 (1998)(due process at the clemency stage will necessarily be "minimal, perhaps even barely perceptible").

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[4] In a dissenting opinion, Justice Stevens opined that clemency proceedings were not exempt from judicial review and that the matter should be remanded to the district court to determine whether the clemency procedures at issue satisfied due process.

Even assuming, based on the views of the concurring justices in *Woodard*, that due process entitled Workman to "minimal procedural safeguards" in connection with his clemency application, none of the various allegations presented in his complaint states a claim for relief. Such minimal application of the due process clause to state clemency proceedings ensures no more than that the prisoner "will receive the clemency procedures *explicitly set forth by state law* and that the procedure followed in reaching the clemency decision will not be wholly arbitrary, capricious or based upon whim. (emphasis added)" *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir. 1998). *See Woodard, supra*, 523 U.S. at 289 (judicial intervention might be warranted where prisoner *arbitrarily* denied access to clemency). The substantive merits of the clemency decision, however, are *not* a proper subject for judicial review. *Duvall, supra*, 162 F.3d at 1061. *See Workman v. Bell*, __ F.3d __, 2001 WL _____ (6th Cir. March 23, 2001), *pet. for rehearing and suggestion for rehearing en banc filed* (March 26, 2001)(Nos. 96-6652; 00-5367)(order denying motion to reopen)(copy attached at App. 2-6). The viability of any of Workman's claims for relief on the basis of the Due Process Clause, then, depends entirely upon what clemency procedures are explicitly provided for under Tennessee law. *See In re Sapp*, 118 F.3d 460, 465 (6th Cir. 1997), *cert. denied*, 521 U.S. 1130 (1997)(certiorari grant in *Woodard*, in which Supreme Court would consider due process standard where state had instituted specific clemency procedures, was irrelevant to situation where state

law had established no specific procedures to control exercise of executive's authority).

Workman begins from the premise that Tennessee state law *does* makes specific provision for clemency proceedings, including provisions for the role of the Parole Board therein.[5] He is incorrect. Tennessee state law, in fact, establishes *no* specific procedures to control or regulate the governor's authority to grant clemency; nor does it require the involvement of the Parole Board in any clemency decision. Instead, Tennessee's clemency scheme commits the authority to make such determinations, and the process for making them, completely to the unfettered discretion of the Governor.

The Tennessee Constitution vests the Governor with the power to grant reprieves and pardons. Tenn. Const. Art. III, § 6. This constitutional power to grant pardons and reprieves embraces the power to commute sentences. *Carroll v. Raney*, 953 S.W.2d 657, 659 (Tenn. 1997); *Ricks v. State*, 882 S.W.2d 387, 391 (Tenn.Crim.App. 1994). While the Governor's clemency authority is recognized by statute, *see* Tenn.Code Ann. § 40-27-101, *et seq.*, that authority is limited only by language in the state Constitution. *Carrol v. Raney, supra,* 953 S.W.2d at 659;[6] *see*

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[5] *See* Memorandum in Support of Motion for Temporary Restraining Order, pp. 10-11, citing, *inter alia*, Tenn. Code Ann. §§ 40-28-103(a), 40-28-106(c).

[6] Art. III, § 6 restricts the governor's clemency authority only in cases of impeachment.

State ex rel. Bedford v. McCorkle, 40 S.W.2d 1015 (Tenn. 1930)(source of governor's clemency power is constitutional, not statutory). This authority *may not be regulated or controlled* by other branches of government, including the legislature. *Ricks v. State, supra* 882 S.W.2d at 391, *citing, inter alia, State ex rel. Rowe v. Connors*, 61 S.W.2d 471, 472 (Tenn. 1932). Accordingly, Workman's reliance on Tennessee statutory provisions pertaining to any role the Parole Board may play in clemency decisions as the source of his due process protection is severely misplaced.

Moreover, even if the Tennessee legislature *could* lawfully regulate or control the exercise of the governor's discretion in clemency, it has not done so. The legislature itself has specifically provided that "[n]othing in [Tenn.Code Ann.] §§ 40-28-101 — 40-28-127 shall be construed in any way as intended to modify or abridge the pardoning power of the governor." Tenn.Code Ann. § 40-28-128; *see also* Tenn.Code Ann. § 40-28-101(b)(nothing in Tenn.Code Ann. §§ 40-28-101 — 40-28-104 shall be construed as modifying or abridging clemency powers of the governor). Furthermore, the very statute to which Workman cites for a description of the Board's role in clemency specifically provides that the Board's involvement is only "upon the request" of the Governor. Tenn.Code Ann. § 40-28-106(c). *See also* Tenn.Code Ann. § 40-28-104(a)(10)(Board has duty to make non-binding recommendations to governor on clemency applications *only upon request* of the

Governor).[7]

Neither these statutes, nor the formal request that the Governor of Tennessee has made that the Board consider and make non-binding recommendations on applications for clemency, establishes any specific procedures for the making of such recommendations. In fact, the Governor's request of the Board specifically provides that:

> [t]hese guidelines are advisory only and do not create any enforceable rights in the petitioner, nor do they restrict the Governor in the exercise of his powers. . . .
>
> While the Governor herein requests the Board to make nonbinding recommendations with respect to executive clemency applications, nothing herein shall be construed to require that the Governor receive or requests(sic) a recommendation from the Board prior to acting upon an application for executive clemency.

Governor's Guidelines for Pardons, Commutations & Reprieves, p. 1, Feb. 1996, as amended Sept. 13, 1999. App. at 7. Even a regulation of the Board that purports to set up procedures for handling clemency applications when the Board is involved makes clear that any hearing on the application is within the Board's discretion. *See* Bd. Parole Reg. 1100-1-1-.15 (b), (c) (Board shall review the application and determine whether the applicant should be scheduled for a hearing). App. 10-11.[8]

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[7] Even when the Governor makes such request, the statute provides that the Board itself have discretion in the making of its non-binding recommendation. *Id.*

[8] While, for purposes of this motion, defendants assume Workman's allegations to be true, they note that this fact tends to belie his allegations that the Board proceedings were skewed in favor of the State from the beginning. If the

The State of Tennessee has simply not made clemency an integral part of its adjudicatory process.

This case, then, is controlled by the decision of the Sixth Circuit in *In re Sapp, supra*, 118 F.3d 460, where the Court affirmed the district court's denial of a death row prisoner's § 1983 complaint challenging the decision of the Governor of Kentucky to deny him clemency. The Court observed the following about Kentucky's clemency scheme:

> It in no way establishes specific procedures to be followed and imposes no standards, criteria, or factors that the Governor need consider in exercising his power. Thus, in Kentucky, the decision to grant clemency is left to the governor's unfettered discretion and the state has not made the clemency process an integral part of the state's overall adjudicative process.

Id. at 465. The Court distinguished Kentucky's scheme from Ohio's, which was at issue in the Sixth Circuit's, and, later, the Supreme Court's, *Woodard* decision, indicating that due process *may* play a role when the state has instituted specific clemency procedures to control a governor's clemency determination. *Id. Cf. Perry v. Brownlee*, 972 F.Supp. 480, 482 (E.D.Ark. 1997), *reversed*, 122 F.3d 20 (8th Cir. 1997)(distinguishing *Sapp*, district court noted that Arkansas' clemency procedures

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defendants had truly sought to ensure the denial of Workman's clemency request, it would seem to have been a far easier course to have simply denied him a hearing, rather than grant the hearing and then go to the elaborate lengths that Workman alleges to "prearrange" the result. It would appear that the only thing truly skewed in this case is Workman's perspective, as he insists on viewing every fact through conspiracy-tinted lenses.

were similar to those in Ohio and granted TRO and stay of execution on §1983 claim challenging denial of clemency).

Tennessee's clemency scheme is like that of Kentucky and unlike that of Ohio. While the Ohio Constitution allows the State legislature to place procedural restrictions on the Governor's pardon power and itself requires the Governor to follow certain procedures, *see Woodard, supra,* 107 F.3d at 1185 n. 1, Tennessee's Constitution places no procedural restrictions or requirements on the Governor's clemency power. The Ohio legislature, in turn, has statutorily delegated the clemency review process to the authority of the Ohio Adult Parole Authority. *Woodard, supra*, 523 U.S. at 276. In Tennessee, the Board's involvement is advisory and discretionary with the Governor. Ohio law requires that the Governor must wait for a recommendation from the Parole Authority before making a clemency decision. *Woodard, supra*, 107 F.3d at 1184. In Tennessee, the Governor has specifically provided that, even when he requests the Board's involvement and recommendation, he need not await it before acting. In Ohio, a clemency hearing must be held within 45 days of an execution date. *Woodard, supra*, 523 U.S. at 276. Tennessee law does not make any provision for a hearing. Even when the Board becomes involved, a hearing is not required, but is scheduled at the discretion of the Board.

To reiterate, any involvement of the Parole Board in Tennessee clemency decisions is left to the complete discretion of the Governor and its role is merely

advisory when the Governor does involve it. In this case, the Governor could just as easily have asked some member of his staff to conduct an investigation into Workman's offense and to present him with a recommendation. The Governor could also have asked the Attorney General himself, or, for that matter, the State Post-Conviction Defender, to make a presentation directly to him to inform his clemency decision. Or the Governor could merely have investigated the clemency application himself without any assistance, utilizing *ex parte* interviews with whomever he chose to consult or studying the record of Workman's trial. In none of these scenarios, would Workman have had any due process rights to contest such investigations or presentations. Indeed, insofar as the Due Process Clause is concerned, the Governor would have been free to announce before any application for clemency was filed that he simply declined to consider clemency in any capital murder case. *See In re Sapp, supra*, 118 F.3d at 465. In the face of this reality, the lack of merit to Workman's claims of impropriety in the process that *was* used in his case becomes readily apparent.

In view of Tennessee's clemency scheme, due process protection did not attach to the Parole Board's proceedings on Workman's clemency application. Accordingly, his several allegations that there were procedural infirmities in those proceedings that constitute a deprivation of his due process rights fail to state any cognizable claim for

relief.[9] Furthermore, and as the Sixth Circuit has already observed, his allegations that evidence presented to the Board by the State was actually false go only to the substantive merits of the clemency decision, which is beyond even the limited judicial review that might be warranted under *Woodard*. *See Workman v. Bell, supra*, 20001 WL _____, slip op. p. 5, *citing Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir. 1998)(Workman's attacks on the evidence presented at his clemency proceeding as erroneous or false is an attack on the proceedings' substantive merits, which a federal court is not authorized to review). App. at 6. More specifically for purposes of his motion for a temporary restraining order, none of these claims has any likelihood of success, much less a strong one. *See Blue Cross & Blue Shield Mutual of Ohio v. Blue Cross and Blue Shield Association*, 110 F.3d 318, 322 (6th Cir. 1997).[10]

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[9] Because due process did not attach to the proceedings conducted by the Parole Board, it is unnecessary to address Workman's claim that he was deprived of substantive, as well as procedural, due process. Suffice to say that the holding and majority view in *Woodard* establish the extent to which the Due Process Clause provides protection in clemency proceedings and make no express distinction between procedural and substantive due process. Both the decision and dissenting opinion on which Workman relies, *Woratzeck v. Arizona Board of Executive Clemency*, 117 F.3d 400 (9th Cir. 1997), and *Otey v. Hopkins*, 5 F.3d 1125 (Gibson, J., dissenting) predate *Woodard* and are inconsistent with it in terms of the breadth of such due process protection.

[10] Workman's complaint is fairly construed as a challenge to the constitutionality of the clemency proceedings conducted by the Parole Board. Defendants note, though, that his memorandum makes a passing allegation that the Attorney General communicated directly with the Governor and that such contact was improper. Any claim of constitutional deprivation based on such an allegation would likewise necessarily be without merit as a matter of law. *See Roll v. Carnahan*, 225 F.3d 1016, 1017 (8th Cir. 2000)(because decision to grant clemency rests in the

II. WORKMAN'S ALLEGATIONS UNDER THE EIGHTH AMENDMENT, EQUAL PROTECTION CLAUSE AND THE TENNESSEE CONSTITUTION LIKEWISE FAIL TO STATE ANY COGNIZABLE CLAIM FOR RELIEF.

Workman contends that, because he is a death row inmate seeking to present evidence of actual innocence in support of his clemency application, the Eighth Amendment's prohibition against cruel and unusual punishment entitles him to even "more process" under the Due Process Clause than the typical death row inmate.[11] No support exists for such a proposition, however. Nothing in *Woodard* event hints that the extent of due process protection afforded a death row inmate in clemency proceedings depends upon the nature of the evidence he seeks to present. While Workman cites *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), in support of his position, he relies only on dicta in that decision. In that

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discretion of the governor, any allegation that the governor cannot be objective fails to state a claim on which relief may be granted). The Ninth Circuit decision, *Woratzeck v. Arizona Board of Executive Clemency*, 117 F.3d 400 (9th Cir. 1997), on which Workman relies held that there was no procedural due process violation. Moreover, in that case Arizona's state laws had established specific procedures controlling the exercise of the clemency authority.

[11] *See* Memorandum in Support of Motion for Temporary Restraining Order, pp. 6-9. Workman suggests that his circumstances are somehow different than those of the prisoner in *Woodard* because he is actually innocent and was not "fairly convicted and sentenced." Workman's conviction and sentence have been affirmed by the courts of Tennessee and his petitions for habeas relief have been denied by the federal courts, including, most recently, the United States Supreme Court. Whatever subjective beliefs he may possess, as a matter of law Workman has been fairly convicted and sentenced.

dicta, the Court assumes, *arguendo*, that a prisoner would be able to seek federal habeas review of a "truly persuasive" claim of actual innocence in instances where no state avenue, such as clemency, were available to process it. *Id.* at 417. Nothing in that dicta suggests that the Eighth Amendment therefore requires certain procedural protections attend that clemency process when it is available for such claims. Indeed, the court's discussion includes no indication that the adequacy of the clemency process is even a relevant consideration. While clemency may be seen as a traditionally available alternative avenue of relief for capital defendants, this does not mean that it is an essential component of a state's criminal adjudicative process subject to judicial review. *See Woodard, supra*, 523 U.S. at 284, *citing Herrera v. Collins, supra*, 506 U.S. at 411-15. Accordingly, Workman's allegations of constitutional deprivation based on the Eighth Amendment likewise fail to state a cognizable claim for relief. Workman certainly has not shown any degree of likelihood of success on such a claim.

While Workman's complaint also purports to include claims based on equal protection grounds and on the Tennessee Constitution, in support of his bid for a temporary restraining order, he makes no attempt to support any of his claims on these bases. In any event, his complaint alleges no facts to suggest that he has been treated differently than any other clemency applicant or that his clemency was denied based upon his membership in some protected class. *See, e.g., Mercer v. City of*

Cedar Rapids, 104 F.Supp.2d 1130, 1140 (N.D.Iowa 2000). Accordingly, such claims are likewise devoid of merit. The same result attends to his attempt to invoke the Tennessee Constitution as the source of his allegedly deprived rights. *See Cline v. Rogers*, 87 F.3d 176, 179 (6th Cir. 1995) (no private right of action lies for alleged violation of Tennessee State Constitution).

Workman's clemency application was not subjected to the flip of a coin; he has not been arbitrarily denied access to clemency; and he has not been subjected to an arbitrary or capricious decision. *See Woodard, supra*, 523 U.S. at 289; *Duvall v. Keating, supra*, 162 F.3d at 1061. The allegations that comprise his § 1983 action simply do not warrant judicial intervention in his clemency process. Workman could have lodged his complaints and concerns about the Parole Board's proceedings with the Governor. He did not.[12] In the final analysis, he was afforded an opportunity to apply for clemency -- not once, but twice. The Governor considered his application and denied it on the basis of completely objective criteria. The federal constitution requires no more. Accordingly, no likelihood of success exists on Workman's several claims.

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[12] Instead, Workman waited for the Governor's decision and then filed this § 1983 action. Such a choice suggests that he is more interested in delaying his execution than he is in having the Governor consider his allegations. One, therefore, might question the utility of granting the relief Workman requests, even if he were entitled to it.

On the other hand, March 30, 2001, marks the third scheduled execution date for Workman within the last year. The State has a compelling interest in protecting the finality of its criminal judgments, particularly after all judicial review provided for by law of the validity of that judgment has been concluded. *See Calderon v. Thompson*, 523 U.S. 538, 556, 118 S.Ct. 1489, 1501, 140 L.Ed.2d 728 (1998). Yet another delay in the lawful execution of the sentence handed down against Workman some nineteen years ago would engender significant harm to that interest.

CONCLUSION

For the reasons advanced, the motion for a temporary restraining order and preliminary injunction should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the plaintiff by delivering a copy, via facsimile, to Christopher M. Minton and Donald Dawson, Office of the Post-Conviction Defender, 530 Church Street, Suite 600, Nashville, Tennessee, 37243, and George Barrett and Edmund L. Carey, Barrett, Johnston & Parsley, 217 Second Avenue North, Nashville, Tennessee 37201, and Cecil Branstetter and James G. Stranch, III, Branstetter, Kilgore, Stanch & Jennings, 227 Second Avenue North, Nashville, Tennessee, 37201, on this the 28th day of March, 2001.

JOSEPH F. WHALEN
Assistant Attorney General

APPENDIX

News Release

Office of Governor Don Sundquist
Press Secretary Beth Fortune
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http://www.state.tn.us/governor

Statement of Gov. Don Sundquist on the clemency of Philip Workman
March 27, 2001

I have reviewed the application for clemency submitted by Philip Workman and have determined that executive clemency is not appropriate. Therefore, the request for clemency is denied.

This decision is based on four criteria:

- I am convinced Philip Workman is guilty of the crime for which he was sentenced to death;
- This case involves the murder of a law enforcement officer;
- The punishment is appropriate under the law;
- I am confident that he has had adequate access to the courts.

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RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
MAR 23 2001
LEONARD GREEN, Clerk

PHILIP R. WORKMAN,	)	
Petitioner-Appellant,	)	
v.	)	**No. 96-6652**
RICKY BELL, WARDEN,	)	
Respondent-Appellee.	)	
IN RE PHILIP R. WORKMAN,	)	
Movant.	)	**No. 00-5367**

Before RYAN, SILER and COLE, Circuit Judges.

SILER, Circuit Judge. This matter comes before the court on a motion to reopen and to appoint a special master made by petitioner, Philip R. Workman, pursuant to the All Writs Act, 28 U.S.C. § 1651, Fed. R. Civ. P. 53(c) and 60(b)(6), and the court's inherent power to protect the integrity of the judicial process. For reasons stated hereafter, we deny the motion.

Workman was convicted in Tennessee for the murder of a Memphis police officer during a robbery in 1981. After unsuccessful direct appeals and state post-conviction proceedings, he petitioned the district court for a writ of habeas corpus under 28 U.S.C. § 2254. The district court denied relief, and that was affirmed by this court in *Workman v. Bell*, 178 F.3d 759 (6th Cir. 1998), *cert. denied*, 528 U.S. 913 (1999). A subsequent petition to file a second habeas corpus action was

denied by a panel of this court and was also denied by an equally divided en banc court in *Workman v. Bell*, 227 F.3d 331 (6th Cir. 2000), *cert. denied*, _____ U.S. _____, 2001 WL 178265 (U.S. Feb. 26, 2001) (No. 00-7620).

After the latest denial of certiorari, the Tennessee Supreme Court set an execution date of March 30, 2001, and the petitioner then filed a motion to stay the execution date and the pending motion to reopen and appoint a special master. This court has subsequently denied the motion to stay the execution date. He then filed a second motion to stay the execution date along with the motion to reopen and to appoint a special master.

Workman claims that the grounds for his pending motion are based upon a fraud upon the court. Specifically, he claims that the State asserted in argument before this court that Workman still had the opportunity to request relief under executive clemency in Tennessee. Although Workman was given a clemency hearing in April 2000, he withdrew the request before the governor acted upon it while his petition for rehearing en banc was proceeding. Later, he had another clemency hearing before the Tennessee Board of Probation and Parole (TBPP) on January 25, 2001. The governor of Tennessee has not yet decided his request for clemency, so far as this court is aware. Workman seized upon language in an order that this court entered in 1999, denying the first petition for rehearing en banc, when we stated:

> "The traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency." *Herrera v. Collins*, 506 U.S. 390, 417 (1993).

Under Tennessee law, the governor may grant clemency, *see* Tenn. Code Ann. §40-27-101, so Workman may produce evidence to the governor that the fatal shot must have come from someone else's gun.

In support of his claim of fraud, Workman makes the following allegations: (1) the Tennessee Attorney General and others from his office, persons associated with the TBPP, representatives of the Shelby County District Attorney's Office and the governor's staff held meetings about the clemency proceedings that were designed to secure his execution; (2) the TBPP was hostile to the witnesses Workman presented during the clemency proceedings; (3) the State presented fabricated expert testimony during the clemency proceedings; and (4) a retired police officer, Clyde Keenan, falsely testified during the clemency proceedings.

In our equally divided opinion denying further relief for the petitioner in *Workman*, 227 F.3d 331, all of the judges agreed that the court can reconsider the petition if there was a fraud upon the court, as explained in *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993). The elements of fraud set out in *Demjanjuk* are conduct:

> (1) On the part of an officer of the court;
> (2) That is directed to the "judicial machinery" itself;
> (3) That is intentionally false, wilfully blind to the truth, or is in reckless disregard for the truth;
> (4) That is a positive averment or is concealment when one is under a duty to disclose;
> (5) That deceives the court.

Id. at 348.

Although the State asserted that a clemency proceeding was available in which Workman could present evidence, it did not make a statement concerning the clemency proceeding that was intentionally false, wilfully blind to the truth, or in reckless disregard for the truth. Taking the

allegations in the light most favorable to Workman, if there was any fraud, it would have been upon the governor of Tennessee or upon the TBPP.

Death row inmates have no constitutional right to clemency proceedings. *See Herrera*, 506 U.S. at 414. The Tennessee Governor has the power to pardon, grant reprieves and commutations in all criminal cases except impeachment. *See* Tenn. Const. art. III, § 6; Tenn. Code Ann. § 40-27-101. The TBPP makes, "upon the request of the governor, . . . nonbinding recommendations concerning all requests for pardons, reprieves or commutations." Tenn. Code Ann. § 40-28-104(a)(10).

We do not sit as super appeals courts over state commutation proceedings. In *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 276 (1998) (plurality opinion), the Court held, "We reaffirm our holding in *Dumschat* [452 U.S. 458 (1988)], that 'pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review.'" However, the court split on the issue of whether clemency proceedings were subject to the constitutional safeguards of the Due Process Clause. *See id.* at 289. Justice O'Connor's concurring opinion concluded that "some *minimal* procedural safeguards apply to clemency proceedings" regardless of whether the power to grant clemency is solely entrusted to the executive. *Id.* (O'Connor, J., concurring). She illuminated the standard by stating, "Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Id.*

Workman does not allege that his Tennessee clemency proceedings failed to meet the standard set out in *Woodard*. He attacks the evidence presented at his clemency proceeding by

saying that it was erroneous or false. Thus, he attacks the proceedings' substantive merits. We are not authorized to review the substantive merits of a clemency proceeding. *See Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir. 1998). Our only review is to see that there are some minimal procedural safeguards. *See Faulder v. Texas Board of Pardons and Paroles*, 178 F.3d 343, 344 (5th Cir. 1999). It is not our duty to determine the quality of the evidence considered by the governor or his board.

Because we deny the motion to reopen and to appoint a special master, the second motion to stay the execution is also meritless.

MOTIONS DENIED.

STATE OF TENNESSEE

DON SUNDQUIST
GOVERNOR

GOVERNOR'S GUIDELINES FOR PARDONS, COMMUTATIONS & REPRIEVES

Issued by Governor Don Sundquist

February 23, 1996
As Amended September 13, 1999

To the Board of Probation and Parole:

Article 3, Section 6 of Tennessee's Constitution provides that the governor shall have the power to grant pardons. The governor also has the power to grant reprieves and commutations. T.C.A. Section 40-27-101. Pursuant to T.C.A. Section 40-28-104(a)(9), the Governor hereby requests the Tennessee Board of Probation and Parole (hereinafter the "Board") to consider and to make nonbinding recommendations concerning requests for pardons, commutations and reprieves. The Board shall have the discretion to make either favorable or unfavorable recommendations. In order to provide guidance to the Board in reviewing petitions for pardons, commutations and reprieves, and in making its recommendations to the Governor, the Governor has established the guidelines set forth below.

The Governor will consider petitions for relief forwarded to him by the Board. The Governor will notify the Board in writing of the Governor's final determination upon a petition submitted to him by the Board. The Board shall advise the petitioner of the Governor's final determination upon a petition submitted to the Governor. At any time before making a final determination on a petition, the Governor may return a petition to the Board for further action, request further information, or both.

These guidelines are advisory only and do not create any enforceable rights in the petitioner, nor do they restrict the Governor in the execution of his powers. The Governor expressly reserves the right to waive any of the non-statutory provisions set forth in these guidelines in any case deemed worthy of special consideration due to extraordinary circumstances. The Governor also expressly reserves the right to deny a petition for relief even though the petitioner meets the requirements of these advisory guidelines if the Governor deems that such a denial is warranted.

While the Governor herein requests the Board to make nonbinding recommendations with respect to executive clemency applications, nothing herein shall be construed to require that the Governor receive or requests a recommendation from the Board prior to acting upon an application for executive clemency.

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I. Pardons.

Meeting the requirements set forth in these guidelines is merely a threshold inquiry in the consideration for pardon relief. The final determination of whether a pardon will be granted lies with the Governor after a review of the petition and the recommendation of the Board. Before a petition for pardon is considered by the Board, the petitioner shall have completed his sentence, including any community supervision.

In order to provide guidance to the Board in reviewing pardon petitions and in making its recommendations to the Governor, the Governor has established the following criteria:

1. The Governor will give serious consideration to pardon requests where:

   a. Petitioner has been neither convicted, nor confined under sentence, nor placed under community supervision within five (5) years since the completion of the sentence(s) from which he seeks a pardon; and

   b. Petitioner has demonstrated good citizenship since the completion of the sentence(s) from which he seeks a pardon, which shall mean both specific achievements and incident-free behavior; and

   c. Petitioner has demonstrated, with proper verification, a specific and compelling need for a pardon.

2. The petitioner has the obligation to provide written verification of good citizenship and of a compelling and specific need in conjunction with 1(b) and 1(c) above. The demonstration of good citizenship shall, among other things, include written communication from at least five (5) persons other than the petitioner or a member of the petitioner's family verifying the period of good citizenship. In addition, the demonstration of a compelling and specific need for a pardon must be verified, in writing, by at least one (1) source other than the petitioner or a member of the petitioner's family; provided, however, the Board may waive this requirement if the circumstances warrant. Generally, the need for a pardon will not be found compelling when other provisions of the law provide appropriate relief for the petitioner.

II. Commutations.

Meeting the requirements set forth in these guidelines is merely a threshold inquiry in the consideration for commutation relief. The final determination of whether a commutation will be granted lies with the Governor after a review of the petition and the nonbinding recommendation of the Board. The availability of commutation of sentence is not intended to serve and will not serve as a review of the proceedings of the trial court or the guilt or innocence of the petitioner.

A. Non-capital sentences

In order to provide guidance to the Board in reviewing commutation petitions and in making its nonbinding recommendations to the Governor, the Governor has established the following criteria:

1. The Governor will give serious consideration to commutation requests where the petitioner has demonstrated, by clear and convincing evidence, that:

   a. Petitioner has made exceptional strides in self-development and self-improvement, and would be a law-abiding citizen; and either

      i. Petitioner is suffering from a life-threatening illness or has a severe chronic disability, said illness or disability is supported by appropriate medical documentation, and the relief requested would mitigate said illness or disability, or

      ii. Petitioner's parent, spouse or child has a life-threatening illness, said illness is supported by appropriate medical documentation, and the petitioner is the only person able to assist in the care of such person; or

      iii. Petitioner has been rehabilitated, is no longer a threat to society, has demonstrated, to the extent his age and health permit, a desire and an ability to maintain gainful employment and fairness supports the petitioner's application.

2. Petitioners eligible for medical furloughs are excepted from falling within section 1(a)(i) and 1(a)(ii) above.

B. Capital Sentences.

The Governor will also give serious consideration to commutation requests based upon the following statutory grounds:

1. Pursuant to T.C.A. Section 40-27-105, upon application for a pardon by a person sentenced to capital punishment, if the Governor is of opinion that the facts and circumstances adduced are not sufficient to warrant a total pardon, the Governor may commute the punishment of death to imprisonment for life in the penitentiary or imprisonment for life without parole in the penitentiary.

2. Pursuant to T.C.A. Section 40-27-106, the Governor may commute the punishment from death to imprisonment for life or imprisonment for life without parole, upon the certificate of the supreme court, entered on the minutes of the court, that in its opinion, there were extenuating circumstances attending the case, and that the punishment ought to be commuted.

III. Reprieves.

The final determination of whether a reprieve will be granted lies with the Governor after a review of the petition and the nonbinding recommendation of the Board.

The Governor will give serious consideration to reprieve requests where the petitioner has been sentenced to death and has exhausted all possible judicial remedies.

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hearing. The Board's files shall reflect the action of the Board in scheduling the case for hearing.

(Rule 11—1—1—.15, continued)

2. If the applicant doe not fall within the Governor's criteria, he/she shall be advised as to why he/she is not eligible for consideration and will not be scheduled for a hearing. He/She shall be advised as to the date on which he/she will be eligible and may reapply for consideration, provided that none of the Board's screening factors are amended by the Governor to prevent such consideration.

(d) General Procedure for Clemency Requests and Hearings.

1. All requests for executive clemency shall be responded to in a timely manner. After the application is received, the applicant and his/her attorney shall be advised as to whether the case is to be scheduled for a hearing and the date, time and place of any hearing. All hearings shall be held promptly following the notice to the applicant and his attorney, unless they are continued, in the Board's discretion, at the request of the applicant or his/her attorney, or pending receipt by the Board of essential information. The notice shall advise the applicant that he/she is entitled to appear at the hearing and to present witnesses and other evidence on his behalf. Such notice shall also include a description of the type of evidence considered by the Board.

2. At the same time that notice is sent to an applicant and his/her attorney, the appropriate judge and district attorney general shall be notified that the case has been set for hearing and the date, time and place of hearing. The notice to the judge and district attorney shall indicate that the Board solicits and welcomes their view and recommendations concerning clemency for the applicant.

3. The Board's staff may compile any or all of the following information for the Board's consideration at the hearing:

   (i) a reclassification/parole summary completed by the institutional staff, if the applicant is an inmate;

   (ii) information about the facts and circumstances surrounding the offense and conviction. Such information shall be obtained through investigation conducted by a parole officer or other individual designated by the Board;

   (iii) a psychiatric/psychological evaluation if the applicant is an individual convicted of a sexual offense or sex related crime;

   (iv) information about medical, mental and/or family problems or needs obtained through investigation by a parole officer or other individual designated by the Board, if appropriate;

   (v) the application, original request, and supporting evidence, and any correspondence in the Board's file concerning the application.

4. If the applicant is requesting a pardon, the following additional information shall be obtained:

   (i) information obtained for FBI and local records checks;

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(Rule 11—1—1—.15, continued)

(ii) information regarding recent social history and reputation in the community; and

(iii) information verifying reasons for pardon request.

5. Although the Board's staff obtains the above information in order that clemency hearings not be completely ex parte in nature, the burden remains on the applicant to establish that he/she is entitled to clemency.

6. At a clemency hearing the Board shall consider, but is not limited to, the following factors:

(i) the nature of the crime and its severity;

(ii) the applicant's institutional record;

(iii) the applicant's previous criminal record, if any;

(iv) the views of the appropriate trial judge and the district attorney general who prosecuted the case;

(v) the sentences, ages and comparative degree of guilt of co-defendants or others involved in the applicant's offense;

(vi) the applicant's circumstances if returned to the community;

(vii) any mitigating circumstances surrounding the offense;

(viii) the views of the community, victims of the crime or their families, institutional staff, parole officers or other interested parties; and

(ix) medical and/or psychiatric evaluation when applicable.

7. The Board will inform the applicant and/or his/her attorney of its recommendation at the end of the hearing or in its discretion will take the case under advisement. In either event, the Board shall advise the applicant that its recommendation to the Governor is non-binding and that the Governor will review any recommendation of the Board.

8. The Chairman shall designate one member of the Board to write a report to the Governor concerning the case. The report shall include:

(i) a brief statement of the reasons for the recommendation;

(ii) the complete file;

(iii) the views of the various Board Members, if the recommendation is not unanimous; and

(iv) the specifics of the recommendation-whether it is a positive or negative one and if a positive recommendation, any terms and conditions recommended by the Board.

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(Rule 11—1—1—.15, continued)

(e) Emergency Medical Clemency Requests. In a small percentage of cases, it is necessary and appropriate that the Board consider requests by individuals recommended for clemency by the Department of Correction's medical staff. At times these individuals may lack competency to apply on their own behalf and the request may be made by the medical staff. These requests are made in unusual or emergency medical situations and may require immediate action by the Board. In such cases, a complete medical report and a detailed statement of the emergency situation will accompany the Board's report to the Governor.

(f) As soon as practicable after the Board's clemency recommendation, it shall forward or cause to be forwarded to the appropriate standing committees of the general assembly, designated by the speaker of the senate and the speaker of the house or representative, a written list of the names of all persons receiving both favorable and unfavorable recommendations.

(g) The list required by subsection (f) of this note shall also be furnished to the appropriate attorney general in whose district any such person was convicted.

(h) Board Supervision of Commutes.

(i) When the Governor of the State of Tennessee commutes a resident's sentence and makes supervision by the Board a condition of such commutation, the Board shall assign the commutee a parole officer in the same manner as if the resident had been released on parole.

(ii) If the parole officer supervising such commutee has reasonable cause to believe such person has violated the conditions of his commutation, he/she shall detail the circumstances of the alleged violation in the form of an affidavit and transmit such affidavit to the Director of Paroles. In no event shall the parole officer arrest, detain or cause the arrest or detention of a commutee unless done on the basis of a warrant from the Governor.

(iii) The Director shall review and shall immediately transmit in appropriate cases affidavits received pursuant to this subsection to the office of the Governor.

(iv) At the request of the Governor, the Board shall conduct a commutation revocation hearing to determine if a commutee violate the conditions of his/her commutation. The Board will conduct such hearings in the same manner and use the same procedures as parole violation hearings are conducted pursuant to rule 1100—1—1—.13(9)(c), (d) and (e).

(v) At the conclusion of the hearing the Board shall transmit the record of such hearing, together with the Board's non-binding findings and recommendations concerning the alleged commutation violation, to the Governor.

Authority: T.C.A. §§40—27—101, 40—27—102, 40—27—104, 40—28—104, 40—28—107 and 40—28—126. ***Administrative History***: *Original rule filed December 6, 1979; effective January 20, 1980. Amendment filed March 11, 1985; effective April 10, 1985. Repeal and new rule filed August 31, 1990; effective November 28, 1990.*

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